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PAYCHEX, INC.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

IRONFORGE.COM, individually and
for all others similarly situated,

Plaintiff,

vs.

PAYCHEX, INC.

Defendant.

CASE NO. CV08-06818 SVW (JWJx)

**MOTION TO TRANSFER VENUE
OF ACTION TO WESTERN
DISTRICT OF NEW YORK:**

(1) NOTICE OF MOTION

(2) REQUEST FOR
JUDICIAL NOTICE

(3) MEMORANDUM OF
POINTS AND AUTHORITIES

(4) DECLARATION OF
BETHANY PELLICONI

(5) DECLARATIONS OF:

- DAVID VOGT
- JOHN BYRNE
- MICHAEL DEATS
- REBECCA WAGNER
- BRIAN MADRAZO

[Each Under Separate Cover]

(6) **[PROPOSED] ORDER**
[Under Separate Cover]

DATE: March 23, 2009

TIME: 1:30 p.m.

CTRM: 6

JUDGE: Hon. Stephen V. Wilson

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1 **NOTICE OF MOTION**

2
3 **TO THE PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

4
5 **PLEASE TAKE NOTICE** that on March 23, 2009, at 1:30 p.m., or as soon
6 thereafter as the matter may be heard, in Courtroom 6 of the above-captioned Court,
7 located at 312 N. Spring Street, Los Angeles, California 90012, Defendant
8 PAYCHEX, INC. will and hereby does move the Court to transfer venue of this
9 action to the Western District of New York on grounds of convenience pursuant to
10 28 U.S.C. § 1404(a).

11 This Motion is based on this Notice, the attached Request for Judicial Notice,
12 Memorandum of Points and Authorities and Declaration of Bethany Pelliconi, the
13 Declarations of David Vogt, John Byrne, Michael Deats, Rebecca Wagner, and
14 Brian Madrazo filed concurrently herewith, the Court's file and records in this
15 action, all matters which may be judicially noticed pursuant to Rule 201 of the
16 Federal Rules of Evidence, and such other and further evidence and arguments as
17 may be presented to the Court at or before the hearing on this Motion.

18 This Motion is made following the conference of counsel pursuant to Local
19 Rule 7-3 which Defendant's counsel attempted to initiate with Plaintiffs' counsel on
20 February 4, 2009, who failed to engage in any such conference with Defendant's
21 counsel. (*See Pelliconi Decl.*, 1:5-19; Exhs. A, B.)
22

23 DATED: February 27, 2009

MCGUIREWOODS LLP

24
25 By: /s/ Matthew C. Kane
26 Matthew C. Kane
27 Bethany A. Pelliconi
28 Attorneys for Defendant PAYCHEX, INC.

1 **REQUEST FOR JUDICIAL NOTICE**

2
3 **TO THE HONORABLE STEPHEN V. WILSON AND TO PLAINTIFFS AND**
4 **THEIR ATTORNEYS OF RECORD:**

5
6 **REQUEST IS HEREBY MADE**, pursuant to Rule 201 of the Federal Rules
7 of Evidence, that the Court take judicial notice of the following documents in
8 connection with Defendant Paychex, Inc.'s Motion to Transfer Venue To Western
9 District of New York:

- 10
- 11 1. Plaintiff Ironforge.com's Complaint filed in this action, a true and
12 correct copy of which is annexed as Exhibit B to the attached
13 Declaration of Bethany Pelliconi.
14
 - 15 2. First Amended Complaint filed in this action, a true and correct copy of
16 which is annexed as Exhibit C to the attached Declaration of Bethany
17 Pelliconi.
18
 - 19 3. Sections 1.8 and 2.1 of the 2008 Operating Rules of the National
20 Automated Clearing House Association, a true and correct copy of
21 which is annexed as Exhibit D to the attached Declaration of Bethany
22 Pelliconi.
23
 - 24 4. Mapquest.com distance calculation from Shortsville, New York to
25 Rochester, New York, a true and correct copy of which is annexed as
26 Exhibit E to the attached Declaration of Bethany Pelliconi.
27

28 DATED: February 27, 2009

McGUIREWOODS LLP

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By: /s/ Matthew C. Kane
Matthew C. Kane
Bethany A. Pelliconi
Attorneys for Defendant PAYCHEX, INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Paychex, Inc. (“Paychex”) is a leading provider of payroll, human
4 resources, and benefits outsourcing solutions for small to medium-sized businesses.
5 Paychex's relationships with all of the Plaintiffs in this action are governed by
6 written service agreements containing New York choice of law provisions and New
7 York arbitration forum selection provisions.

8 Paychex’s corporate headquarters and principle place of business are in
9 Rochester, New York, and two of the three named Plaintiffs in this matter are also
10 located in the Rochester, New York area. Further, Plaintiffs are being represented in
11 this action by attorneys from New York, virtually all of the key third party witnesses
12 in this matter are located in New York or the eastern United States, and a majority
13 of the putative class members are located in the eastern United States – with 24% in
14 New York or in the nearby states of New Jersey and Pennsylvania.
15 Notwithstanding, and in violation of the binding provisions of their service
16 agreements with Paychex, Plaintiffs are attempting to bring this putative nationwide
17 consumer class action asserting only claims under California law against Paychex in
18 this Court venued in California.

19 As we discuss below, this action should be transferred to the **Western**
20 **District of New York** pursuant to 28 U.S.C. § 1404(a), on grounds of convenience,
21 for the following reasons:

- 22
- 23 **1. Venue is proper in the Western District of New York** pursuant to 28
24 U.S.C. § 1391(a) because Paychex’s *principal place of business*,
25 including its *corporate headquarters*, is located in **Rochester, New**
26 **York**. Therefore, Plaintiffs could have brought this action in the
27 Western District of New York, which has subject matter jurisdiction
28 pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A).

1 The Complaint alleges that the amount in controversy exceeds
2 \$5,000,000 exclusive of interest and costs, and that some members of
3 the putative class are citizens of states different than Paychex.
4

5 **2. Virtually all of the key third party witnesses are located in New**
6 **York or in the eastern United States.** Many of those third party
7 witnesses are subject to compulsory process in the Western District of
8 New York.
9

10 **3. All seven of Paychex's corporate offices are located in the greater**
11 **Rochester, New York area.** This includes Paychex's corporate
12 headquarters, which is located in Rochester, New York.
13

14 **4. All of Paychex's key employee witnesses (who are identified herein**
15 **and in the accompanying Declarations) are located in the Rochester,**
16 **New York area.**
17

18 **5. More than half (57%) of the putative class members are located in**
19 **the eastern United States (with 24% in the New York area),**
20 **whereas only about 18% are located in California.**
21

22 **6. Sources of proof relevant to this action are stored on computer**
23 **servers and in paper files physically located in Rochester, New**
24 **York.** These sources of proof are not easily accessible elsewhere.
25

26 **7. All putative class members have written service agreements with**
27 **Paychex that contain New York choice of law and Rochester, New**
28 **York arbitration forum selection provisions.** Further, the electronic

1 funds transfer clearing house regulations which govern Paychex's
2 processing of the transactions at issue in this action contain a New
3 York choice of law provision.
4

5 **8. Plaintiff Road Service, Inc. and the putative class members who**
6 **have utilized Paychex's 401(k) and retirement record keeping**
7 **services have Master Custody Agreements with JP Morgan Chase**
8 **Bank which contain a New York choice of law clause.** In addition,
9 J.P. Morgan Chase Bank is located in New York.
10

11 **9. Plaintiff's attorneys are located in New York.** Only Plaintiff's
12 nominal "Liaison Counsel" is located in California.
13

14 Therefore, Paychex's motion should be granted and this action should be
15 ordered transferred to the Western District of New York.
16

17 **II. STATEMENT OF FACTS**

18 **A. Plaintiffs And Their Attorneys**

19 At the time the initial Complaint in this action was filed, there was only one
20 named Plaintiff in this matter, Ironforge.com ("Ironforge"). (Doc. #1.) In response
21 to the Complaint, Paychex filed a Motion to Transfer Venue Of Action To Western
22 District of New York (Doc. #9) and a Motion to Dismiss And/Or Strike Claims in
23 Class Action Complaint (Doc. #10).¹
24

25
26 ¹ Paychex filed Notices of Withdrawals, Without Prejudice, of these Motions
27 (Doc. #16, Doc. #17) after the FAC was filed, so that new Motions could be filed
28 with respect to the FAC.

1 Thereafter, on January 22, 2009, Plaintiff filed a FAC, which added a new
2 claim and *two new parties who are both located in New York*: Handyman Home
3 Solutions d/b/a/ Mr. Handyman of Eastern Monroe County, Inc. ("Handyman") and
4 Road Service, Inc. ("Road Service"). (Exh. C.) As alleged in the FAC, Handyman
5 is located in the same county as Paychex (Monroe County), and Road Service is
6 located in "Shortsville, New York" (Exh. C, 3:19-4:5) which is approximately 30
7 miles from Paychex's Rochester, New York corporate offices. (Exh. E.) The FAC
8 alleges that Road Service utilized Paychex's 401(k) services, whereas Ironforge and
9 Handyman utilized Paychex's payroll services. (Exh. C, 14:18-19:9.)²

10 Plaintiffs' FAC asserts claims on behalf of themselves and a putative class of
11 all persons similarly situated, defined as follows: "All persons in the United States
12 who have been or currently are Paychex customers from January 22, 2003, to
13 January 22, 2009." (Exh. C, 5:4-6.) The claims asserted in the FAC are based on
14 Plaintiffs' allegations that Paychex "arbitrarily" increases fees, charges "small,
15 undisclosed fees which customers never agreed to pay," "wrongly keeps interest"
16 and/or "profit[s] by earning unjustified interest." (Exh. C, 1:19-20; 13:3; 14:3-5.)

17 Plaintiff is represented in this action by attorneys Yasmeen Allen and Craig
18 Lanza of the Balestriere Lanza PLLC law firm in New York. (See Exh. C.) They
19 only have nominal "Liason Counsel" in California. (*Id.*)

20 21 **B. Paychex's Business**

22 Paychex is a leading provider of payroll, human resources, and benefits
23 outsourcing solutions for small to medium-sized businesses. (Byrne Decl., 1:7-8;
24 Wagner Decl., 1:6-7). Its corporate headquarters and principal place of business are
25 _____

26 ² Because one of the newly added Plaintiffs, Road Service, utilized Paychex's
27 retirement record keeping services, Plaintiffs have *expanded* the potential putative
28 class to include clients who received those services.

1 in Rochester, New York. (Madrazo Decl., 1:4-6; Byrne Decl., 1:15-18.) In addition
2 to its corporate headquarters, Paychex has six other corporate offices in the
3 Rochester, New York area. (Byrne Decl., 1:15-18; Deats Decl., 1:5-7.)

4 Paychex offers its electronic payroll services (e.g., its Direct Deposit,
5 Taxpay[®] and Readychex[®] services) to its clients through a batch-oriented electronic
6 funds transfer (“EFT”) system referred to as the “ACH Network” (ACH stands for
7 “Automated Clearing House”). (Wagner Decl., 1:7-11; Deats Decl., 1:13-17.)
8 Paychex also uses the ACH Network to debit funds for other services products,
9 including its retirement record keeping services, Section 125 Plan, and insurance
10 administration services ("Additional Services"). (Wagner Decl., 1:13-15.) Most
11 clients receiving electronic payroll and Additional Services pay their fees through an
12 EFT payment. (Wagner Decl., 1:15-17.)

13 The ACH Network is a payment network that uses national standards for
14 clearing interbank EFT payments between customers of participating depository
15 financial institutions. (Wagner Decl., 1:10-12; Byrne Decl., 1:12-14.) It is
16 governed by rules promulgated and enforced by the National Automated Clearing
17 House Association (“NACHA”), which itself is governed by depository financial
18 institutions. (Wagner Decl., 1:18-21.) The Federal Reserve Bank and the Electronic
19 Payments Network act as ACH Operators, which are central clearing facilities
20 through which financial institutions transmit or receive ACH payment transactions.
21 (Deats Decl., 1:17-19; Vogt Decl., 1:12-14.)

22 Paychex requires that all of its electronic payroll services and Additional
23 Services clients sign written services agreements which are expressly governed by
24 the laws of the State of New York, and provide for binding arbitration in Rochester,
25 New York. (Byrne Decl., 3:27-4:7.) For example, the service agreements executed
26 by Plaintiffs Ironforge.com and Handyman provide in relevant part as follows:

1 **“Governing Law and Arbitration.** The Agreement shall
2 be governed by the laws of the State of New York. Except
3 as provided herein, any dispute arising out of, or in
4 connection with, the Agreement shall be determined by
5 binding arbitration in Rochester, New York, in accordance
6 with the commercial rules of the American Arbitration
7 Association. . . .” (Byrne Decl., Exh. A, at ¶ 11, Exh. B, at
8 ¶ 18.)

9
10 The service agreement between Paychex and Roadservice also contains a
11 provision requiring application of New York law to disputes between the parties,
12 and a provision requiring binding arbitration in Rochester, New York:

13
14 “The Agreements shall be governed by the laws of the
15 State of New York. Except as provided herein, any
16 dispute arising out of or in connection with the
17 Agreements shall be determined by binding arbitration in
18 Rochester, New York, in accordance with the commercial
19 rules of the American Arbitration Association . . .” (Byrne
20 Decl., Exh. C, at ¶ 9.)

21
22 The retirement services agreement between Paychex and Road Service
23 likewise contains a New York choice of law provision, and a provision requiring
24 disputes to be determined by binding arbitration in Rochester, New York:

1 **"Governing Law and Arbitration:** The Agreement shall be
2 governed by the laws of the State of New York, to the extent
3 not preempted by ERISA.³ Except as provided herein, any
4 dispute arising out of, or in connection with, the Agreement
5 shall be determined by binding arbitration in Rochester, New
6 York, in accordance with the commercial rules of the American
7 Arbitration Association." (Byrne Decl., Exh. D, at ¶ 32.)
8

9 Paychex's clients who utilize its retirement record keeping services are also
10 required to execute a "Master Custody Agreement" with JP Morgan Chase Bank
11 ("JP Morgan"), the custodian of the account which is located in New York, which
12 also contains a New York choice of law clause. (Byrne Decl., 4:8-14.) The Master
13 Custody Agreement between JP Morgan and Road Service provides in pertinent part
14 as follows:
15

16 20. **Miscellaneous.** This Agreement shall
17 be governed by the laws of the State of
18 New York." (Byrne Decl., Exh. E.)
19
20
21
22

23 ³ In Paychex's Motion to Dismiss, filed concurrently herewith, Paychex takes the
24 position that the claims asserted by Plaintiff Road Service are preempted by ERISA.
25 Paychex anticipates that Plaintiffs will take a contrary position in opposition to the
26 Motions. To the extent that Plaintiffs do so, they thereby concede that New York
27 law must be applied to any claims asserted by Road Service, as required by
28 paragraph 32 of the retirement services agreement, because that paragraph provides
 for application of New York law as to all claims not preempted by ERISA.

1 In addition, the rules promulgated by NACHA, which govern both Paychex
2 and its clients that utilize EFT payment services for payroll and retirement record
3 keeping, are expressly incorporated into the Paychex service agreements in
4 accordance with NACHA rules. For example, the service agreement which was
5 executed by Ironforge provides in relevant part:

6
7 **“4. Electronic Funds Transfers.** All EFTs are performed
8 in compliance with the National Automated Clearing
9 House Association operating rules (“NACHA”). Client
10 agrees to follow and be bound by NACHA as they are
11 amended from time to time and assumes the
12 responsibilities of an initiator of EFTs. . . .” (Byrne Decl.,
13 Exh. A, at ¶ 4; *see also* Exh. D [NACHA Rule 2.1].)

14
15 The service agreements executed by Handyman and Road Service likewise
16 incorporate the NACHA rules:

17
18 **"Electronic Funds Transfer.** * * * All EFTs are
19 performed in compliance with the National
20 Automated Clearing House Association operating
21 rules ("NACHA"). Client agrees (i) to follow
22 NACHA, as they are amended from time to time;
23 (ii) that it will not initiate any EFT that violates any
24 law; and (iii) that Paychex may identify Client to
25 banks involved in the EFT." (Byrne Decl., Exh. B
26 at ¶ 9, Exh. C, at ¶24.)
27
28

1 The NACHA rules, which Plaintiffs and the putative class members "agree[]
2 to follow", likewise contain a New York choice of law provision:

3
4 SECTION 1.8 Choice Of Law

5 These rules and the rights and obligations of a party with
6 regard to a credit entry subject to Article 4A shall be
7 construed in accordance with and governed by the laws of
8 the State of New York, unless otherwise provided in an
9 agreement of such party. (*See* Exh. D.)
10

11 **C. Key Paychex Employee Witnesses**

12 All of Paychex's corporate decisions are made by its authorized employees
13 who work in its corporate offices located in the Rochester, New York area, and all
14 of its policies and procedures are created and disseminated from those offices.
15 (Byrne Decl., 2:24-3:6.) Such decisions, policies, and procedures include (1)
16 procedures for providing client payroll processing services, (2) protocols for
17 handling client complaints, (3) setting pricing and fees for client services, (4) client
18 billing guidelines, (5) protocols for discounting fees for client services, (6) client
19 service agreement provisions, (7) protocols for the timing of transmitting ACH
20 transaction batch files for each service that Paychex provides, (8) protocols for
21 handling interest income earned on client funds held in Paychex's corporate
22 accounts, (9) creation of training materials for sales representatives, and (10)
23 creation of corporate marketing and advertising materials. (*Id.*)

24 While Paychex branch office personnel provide some services to clients, the
25 actual debiting of funds from client bank accounts for electronic payroll services and
26 Additional Services is performed by Paychex corporate office employees located in
27 Rochester, New York. (*Id.*, 3:6-9.) Further, Additional Services such as retirement
28

1 record keeping are all provided to clients by Paychex corporate office employees
2 located in the Rochester, New York area. (*Id.*, at 3:9-11.)

3 Paychex's corporate employees who would testify about and/or be involved
4 with the defense of the claims alleged in the FAC are all located in the Rochester,
5 New York area. These employees include the following individuals:

6
7 **1. David Vogt, Paychex's Manager Treasury Operations.** Mr.
8 Vogt is responsible for managing: (1) Paychex's Cash
9 Management Group, which is responsible for the daily cash
10 management process that determines the cash positions in
11 Paychex's bank accounts; (2) Paychex's Client Funds Accounting
12 Group; and (3) Paychex's bank relationships for its corporate and
13 operating accounts. By virtue of his position, Mr. Vogt would be
14 able to testify on behalf of Paychex about client fund accounting
15 and records pertaining thereto, interest earned on client funds,
16 and interactions between Paychex and the banks which process
17 its clients' ACH transactions. (Vogt Decl., 1:16-3:5; Madrazo
18 Decl., 2:11-13.)

19
20 **2. John Byrne, Paychex's Manager of Strategic Operations.**
21 Mr. Byrne is the "Lead Data Owner" of Paychex's core payroll
22 product and billing systems. He would testify on behalf of
23 Paychex about the records stored in Paychex's core payroll and
24 online repository systems, which store client documents in
25 automated databases on its computer servers physically located
26 in Rochester, New York. Mr. Byrne would also testify about
27 Paychex's corporate policies and procedures, including those
28 relating to processing client payroll services, client service

1 agreements, and setting pricing and fees for client services.
2 (Byrne Decl., 1:21-4:14; Madrazo Decl., 2:3-5.)
3

4 **3. Rebecca Wagner, Paychex's HRS Analyst III.** Ms. Wagner is
5 responsible for ensuring Paychex's operations are in compliance
6 with all applicable banking and NACHA regulations. She also
7 handles client disputes where a client believes charges for
8 Paychex's services were not authorized. Ms. Wagner would
9 testify about Paychex's compliance with banking regulations and
10 NACHA rules, protocols used by Paychex for the timing of
11 client bank account debit transactions and the timing of related
12 payroll check and tax remittance payments made by Paychex on
13 behalf of clients with their debited funds. She would also testify
14 about the protocols used by Paychex for handling complaints
15 from clients about purported unauthorized fees and transactions.
16 (Wagner Decl., 1:3-2:8; Madrazo Decl., 2:6-7.)
17

18 **4. Michael Deats, Paychex, Inc.'s ENS Product and Operations**
19 **Manager.** Mr. Deats is responsible for supervising and
20 managing Paychex's Electronic Network Services ("ENS")
21 Product and Operations Department. That department monitors
22 incoming files containing payroll instructions for Paychex's
23 client accounts nationwide, and ensures that the ACH files
24 containing those instructions are received by Paychex's partner
25 banks, which, in turn, transmit the instructions to the clients'
26 and/or their employees' banks and the banks of various state and
27 federal agencies. Mr. Deats would testify about Paychex's
28 payroll operations, monitoring of incoming payroll files

1 containing payroll instructions for Paychex, Inc.'s clients
2 nationwide, and procedures for ensuring that the ACH files
3 containing payroll instructions are received by Paychex, Inc.'s
4 partner banks. (Deats Decl., 1:3-2:19; Madrazo Decl., 2:8-10.)
5

6 **5. Neil Rohrer, Director of Marketing.** Mr. Rohrer would testify
7 about Paychex's marketing policies, protocols, and marketing
8 materials distributed to clients. (Madrazo Decl., 2:2:14-16.)
9

10 **6. Joni McManus, Advertising Manager.** Ms. McManus would
11 testify about Paychex's advertising policies, procols, and
12 advertising materials distributed to clients. (Madrazo Decl.,
13 2:17-19.)
14

15 **7. Kimberly Kelly, Training Center Director.** Ms. Kelly would
16 testify about the training of Paychex's sales representatives.
17 (Madrazo Decl., 2:20-22.)
18

19 **8. Brian Madrazo, Paychex's In-House Corporate Counsel.**
20 Mr. Madrazo is not a witness in this matter, but he is responsible
21 for managing this litigation, and he resides and works in the
22 Rochester, New York area. (Madrazo Decl., 1:2-26.)
23

24 **D. Access To Proof**

25 Paychex currently has more than 550,000 clients that utilize payroll services
26 and over 45,000 that receive retirement record keeping services. (Byrne Decl., 2:6-
27 8.) More than half (57%) of those clients (i.e., the putative class members alleged in
28 the Complaint) are located in the eastern United States, with approximately 24%

1 located in New York or in the nearby states of New Jersey and Pennsylvania. (*Id.*,
2 2:6-9.) In contrast, only about 18% of the putative class members are located in
3 California. (*Id.*, 2:6-10.)

4 Virtually all of Paychex's records on these clients (and any clients receiving
5 Additional Services such as 401(k) services), including records pertaining to
6 invoicing, the debiting of funds from client accounts and the remittance of funds to
7 client employees and tax authorities, are maintained in separate electronic databases
8 which are stored on Paychex's computer servers physically located in the Rochester,
9 New York area. (*Id.*, 2:6-16; 3:13-15.) These records include client service
10 agreements and new account documents, client complaints about purported
11 unauthorized transactions, and records reflecting ACH transactions processed on
12 behalf of clients. (*Id.*, 2:16-18.) Access to these databases is generally not available
13 to Paychex employees located outside of its corporate offices in the Rochester, New
14 York area, except for certain employees who have limited access to only portions of
15 the databases for specified purposes. (*Id.*, 19-22.)

16 In addition, Paychex's corporate banking records are all stored on its
17 computer servers physically located in the Rochester, New York area as well. (Vogt
18 Decl., 2:21-3:5.) Paychex's client banking records are likewise physically located
19 exclusively in the Rochester, New York area. (*Id.*) All of Paychex's corporate
20 records relating to retirement plan services, including electronic records, invoices,
21 service agreements, basic plan documents, adoption agreements, summary plan
22 descriptions and records pertaining to communications with clients who receive
23 these services, are located in the Rochester, New York area. (*Id.*, Byrne Decl., 3:22-
24 26.)

1 **E. Key Third Party Witnesses**

2 **1. Bank Witnesses**

3 Paychex processes its clients' ACH transactions primarily through the
4 Operational Centers of Bank of America, Wells Fargo Bank, PNC Bank, and JP
5 Morgan. (Vogt Decl., 2:2-4.) Bank of America also sponsors Paychex to send ACH
6 files directly to the Electronic Payment Network ("EPN").⁴ (Vogt Decl., 2:4-5.)
7 The primary Operational Centers for these financial institutions are located in
8 Florida, Pennsylvania, Minnesota, Virginia, and North Carolina; only one is located
9 in California (San Francisco). (Vogt Decl., 2:8-10). JP Morgan is the custodian for
10 all clients of Paychex that utilize Paychex's retirement record keeping services, and
11 all such clients are required to enter into Master Custody Agreements with JP
12 Morgan, which is located at 450 W. 33rd Street, 10th Floor, New York, NY 10001.
13 (Byrne Decl., 3:27-4:7, Exh. E, at ¶ 21.)

14 Of these financial institutions, JP Morgan, PNC Bank, Wells Fargo Bank, and
15 Bank of America each have a "Relationship Officer" who oversees all aspects of its
16 interactions with Paychex, including management of the service agreements
17 pertaining to ACH transactions, opening and closing of accounts and services, credit
18 needs, treasury services, and operational issue resolution. (*Id.*, 2:11-15.) The
19 Relationship Officers for JP Morgan and Bank of America are both located in
20 Rochester, New York. (*Id.*, 2:17-18.) The Relationship Officer for Wells Fargo
21 Bank is located in New York City, and the Relationship Officer for PNC Bank is
22 located in Greenwich, Connecticut. (*Id.*, 2:18-20).

23 Employees from the Operational Centers of these financial institutions, and
24 their Relationship Officers, would likely be called upon to testify in this action about
25 their interactions with Paychex concerning ACH transactions and whether any of the

26
27 ⁴ EPN is comprised primarily of financial institutions and is the only private-sector
28 ACH Operator in the country. (Vogt Decl., 2:5-6).

1 transactions at issue in this action involved errors on the part of their financial
2 institutions. Indeed, Ironforge alleges in the FAC that one of its own representatives
3 had several conversations with Wells Fargo Bank about stopping the alleged
4 unauthorized transactions in his account and that Ironforge's representative
5 discussed with a Wells Fargo Bank representative whether the transactions were a
6 result of the bank's error. (*See* Exh. C, 15:5-16.)

7
8 **2. Accountants And Other Service Providers For Plaintiffs and**
9 **Putative Class Members**

10 According to the allegations in the FAC, various service providers for the
11 Plaintiffs are percipient witnesses in this matter. In particular, the FAC alleges that
12 Handyman "hired an accountant" to review the company's financial records "to
13 assess the extent of [Paychex's] improper withdrawals" and that the accountant
14 spoke with a Paychex representative about it. (Exh. C, 18:15-19:4.) Likewise, the
15 FAC alleges that Road Service "contacted his 401(k) provider" who notified him
16 that "none of [the funds withdrawn by Paychex] were transferred towards his
17 retirement plan as indicated by Paychex." (Exh. C, 17:9-13.) Because Handyman
18 and Road Service are located in the Rochester, New York area, these service
19 providers likely are also located in that area as well. Further, based on Plaintiffs'
20 allegation that Paychex's "typical customers are small to medium-sized businesses
21 that do not have the time or resources to set up in-house payroll systems" (Exh. C,
22 2:12-14), it is likely that the putative class members also utilized third party
23 accountants and other service providers that would be witnesses in this matter, and
24 that they are located in close proximity to the putative class members who hired
25 them – i.e., a majority located in the eastern United States, with 24% located in New
26 York and the nearby states of New Jersey and Pennsylvania.

1 **III. THIS ACTION SHOULD BE TRANSFERRED TO THE WESTERN**
2 **DISTRICT OF NEW YORK**

3 **A. Legal Standard Applicable To Motion To Transfer Venue**

4 28 U.S.C. § 1404(a) provides as follows:

5 “For the convenience of parties and witnesses, in the
6 interest of justice, a district court may transfer any civil
7 action to any other district or division where it might have
8 been brought.” 28 U.S.C. § 1404(a).

9 The purpose of this statute is to “prevent the waste of time, energy, and money and
10 to protect litigants, witnesses and the public against unnecessary inconvenience and
11 expense.” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). A motion to transfer
12 the venue of an action lies within the broad discretion of the district court and is to
13 be determined on an individualized, case by case basis. *See Jones v. GNC*
14 *Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000).

15 The following factors are to be considered by a district court in deciding
16 whether to grant a motion to transfer venue under 28 U.S.C. § 1404(a):

- 17 (1) the plaintiff’s choice of forum (which is entitled to only “minimal
18 consideration” in a class action lawsuit);⁵
19 (2) the convenience of the parties and witnesses;
20 (3) the ease of access to sources of proof;
21 (4) familiarity of each forum with the applicable law;
22 (5) feasibility of consolidation with other claims;
23 (6) local interest in the controversy; and
24 (7) relative court congestion.

25
26
27 ⁵ *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987).

1 *See Lou v. Belzberg*, 834 F.2d at 739; *Williams v. Bowman*, 157 F.Supp.2d 1103,
2 1106 (N.D. Cal. 2001); *Johns v. Panera Bread Co.*, 2008 WL 2811827 (N.D. Cal.
3 2008).

4
5 **B. This Action Could Have Been Brought In The Western District Of**
6 **New York**

7 The Western District of New York has subject matter jurisdiction over this
8 action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A).
9 Plaintiff's Complaint alleges that the amount in controversy exceeds \$5,000,000
10 exclusive of interest and costs, and that some members of the putative class are
11 citizens of states different than Paychex. (*See* Exh. C, 3:6-8.)

12 Venue is proper in the Western District of New York pursuant to 28 U.S.C. §
13 1391(a) because Paychex's principal place of business, including its corporate
14 headquarters, is located in Rochester, New York. *See, e.g., International Shoe Co.*
15 *v. Washington*, 326 U.S. 310, 316 (1945) (for venue purposes, a corporation resides
16 in all districts in which it is subject to personal jurisdiction).

17 Moreover, Plaintiffs are represented by attorneys in New York who either are
18 admitted or could gain full admission (rather than being admitted *pro hac vice*) to
19 the Western District of New York bar. (*See* Exhibit C.) Plaintiffs only have
20 nominal "Liaison Counsel" located in California. (*Id.*)

21
22 **C. Paychex's Key Employee Witnesses Are Located In The Western**
23 **District of New York**

24 In deciding whether to grant motions to transfer venue in class action
25 lawsuits, district courts in the Ninth Circuit have uniformly held that the
26 convenience of witnesses warrants granting the motion where, as here, the
27 defendant's corporate headquarters and corporate witnesses are located in another
28 jurisdiction, especially if a large number of the putative class members are located

1 outside of the chosen jurisdiction. *See Johns v. Panera Bread Co.*, 2008 WL
2 2811827 *3 (N.D. Cal. 2008) (granting motion to transfer venue in wage and hour
3 class action to place of defendant's corporate headquarters); *Foster v. Nationwide*
4 *Mut. Ins. Co.*, 2007 WL 4410408 *4-5 (N.D. Cal. 2007) (granting transfer of FLSA
5 and state wage and hour class action on grounds of convenience where defendant's
6 corporate headquarters and many witnesses located in proposed transferee district);
7 *Hoefer v. U.S. Dept. of Commerce*, 2000 WL 890862 (N.D. Cal. 2000) (granting
8 motion to transfer on grounds of convenience in class action alleging illegal taxes
9 where defendants' headquarters were in Washington and "crucial witnesses" were
10 located there). *See also Evancho v. Sanofi-Aventis U.S., Inc.*, 2007 WL 1302985 *3
11 (N.D. Cal. 2007) (convenience of parties and witnesses favored transfer where large
12 number of critical witnesses live and work in New Jersey, and greater proportion of
13 putative class members live and work on east coast as compared to west coast).

14 In *Foster v. Nationwide Mutual Ins. Co.*, the court granted a motion to
15 transfer venue to the Southern District of Ohio based on facts and circumstances
16 similar to those which exist in this action. The plaintiffs had filed a putative wage
17 and hour class action in the Northern District of California because one of the
18 named plaintiffs lived there, the defendant had California offices, and a majority of
19 the plaintiffs who had opted-in resided on or near the West Coast. The defendant
20 moved to transfer venue to the Southern District of Ohio, which was the location of
21 its corporate headquarters and of its management-level employees who were likely
22 to testify at trial. In granting the motion to transfer venue, the court reasoned that:

23
24 "Defendant asserts that the Southern District of Ohio will
25 be more convenient for both parties and witnesses. The
26 Court agrees. Defendant's corporate headquarters is
27 located in Columbus, Ohio, as are many of the witnesses
28 defendant would likely call to testify at trial. For instance,

1 most of defendant's management-level employees who
2 oversee the special investigators or work in human
3 resources are based in Ohio; others work in Iowa and
4 Florida, making Ohio more convenient for them as well.”
5 2007 WL 4410408, at * 4.

6
7 *See also Hoefer v. U.S. Dept. of Commerce, supra* (noting, in granting motion to
8 transfer venue, that “[l]itigation should proceed where the case finds its ‘center of
9 gravity,’” which was the location of the defendants’ corporate offices and
10 headquarters) (citing *Teknekron Software Sys. Inc. v. Cornell Univ.*, 1993 WL
11 215024 (N.D. Cal. 1993)); *Evancho v. Sanofi-Aventis U.S. Inc., supra*, 2007 WL
12 1302985 *3 (granting motion to transfer venue to New Jersey where “a large
13 number of critical witnesses live and work in New Jersey, and a greater proportion
14 of the putative class members live and work on the east coast than on the west
15 coast”); *Freeman v. Hoffman-LaRoche Inc.*, 2007 WL 895282 *2 (S.D.N.Y. 2007)
16 (location of defendant's corporate witnesses was important factor in deciding motion
17 to transfer venue); *Waldmer v. SER Solutions, Inc.*, 2006 WL 314346 (D. Kan.
18 2006) (noting, in granting motion to transfer venue to Virginia, that “the logical
19 origin of this dispute is Virginia. It was at the company's headquarters in Virginia
20 [where defendant’s] personnel made and implemented the decision [at issue]. No
21 company policies were ever established in Kansas.”)

22 Here, as in the foregoing cases, the location of Paychex’s employee witnesses
23 and of putative class members favors a transfer of this action to the Western District
24 of New York. All of Paychex’s corporate witnesses are located in the Rochester,
25 New York area, which is the location of its corporate headquarters and principal
26 place of business. (Byrne Decl., 1:5-6; 1:15-18; 2:24-26; Madrazo Decl., 1:3-6,
27 1:27-2:24.) In addition to the Paychex employee witnesses identified above and
28 who can be expected to testify about the claims alleged in the Complaint, virtually

1 any other Paychex employee who would testify in this action is located at its
2 corporate offices in the Rochester, New York area. (*Id.*; Deats Decl., 1:3-7, 1:21-
3 2:19; Vogt Decl., 1:3-6, 1:16-2:1, 2:21-3:2 .) Thus, it would be more convenient for
4 these witnesses if the trial of this action occurred in the Western District of New
5 York.

6
7 **D. The Majority Of The Putative Class Members Are Located In The**
8 **Eastern United States**

9 Further, the majority of Paychex’s payroll services clients (57%), who are the
10 putative class members in this action (as alleged in the Complaint), are located in
11 the eastern United States, and 24% of them are located in New York and in the
12 nearby states of New Jersey and Pennsylvania. (Byrne Decl., 2:6-11.) In contrast,
13 only about 18% of those putative class members are located in California. (*Id.*, 2:8-
14 10.) Therefore, it would be more convenient for the putative class members if the
15 trial of this matter were to take place in the Western District of New York as well.
16 *See Evancho v. Sanofi-Aventis U.S. Inc.*, *supra*, 2007 WL 1302985 *3 (granting
17 motion to transfer venue to New Jersey where “a large number of critical witnesses
18 live and work in New Jersey, and a greater proportion of the putative class members
19 live and work on the east coast than on the west coast”).

20
21 **E. The Key Third Party Witnesses Are Located In New York And On**
22 **The East Coast**

23 The convenience and location of key third party witnesses is one of the most
24 important factors in deciding whether to grant a motion to transfer the venue of an
25 action on grounds of convenience. *See Saleh v. Titan Corporation*, 361 F.Supp.2d
26 1152, 1160 (S.D. Cal. 2005); *Florens Container v. Cho Yang Shipping*, 245
27 F.Supp.2d 1086, 1092 (N.D. Cal. 2002).

1 Here, the most critical third party witnesses are the Relationship Officers and
2 the Operations Center employees from the financial institutions which process
3 Paychex's clients' electronic payroll transactions. (*See* Vogt Decl., 2:2-25.) These
4 third party witnesses can be expected to testify about ACH transactions involving
5 Paychex and its clients, instructions transmitted by Paychex with respect to those
6 transactions, and whether any of the transactions at issue in this action constituted
7 mistakes by their financial institutions. (*Id.*) Indeed, the FAC alleges that Ironforge's
8 own representative had communications of this nature with a representative of Wells
9 Fargo Bank. (*See* Exh. C, 12:25-13:13.)

10 The Relationship Officers at these financial institutions are located in
11 Rochester, New York, New York City, and Greenwich, Connecticut. As such, if
12 this action is transferred to the Western District of New York, it would be more
13 convenient for these third party witnesses and most of them would be subject to
14 compulsory process by subpoena. *See* Fed.R.Civ.Proc. Rule 45(b)(2) (for nonparty
15 witnesses, the court's subpoena power extends to any place within the district and/or
16 within 100 miles of the place of trial). The Operations Center employees at these
17 financial institutions are located in Florida, Pennsylvania, Virginia, and North
18 Carolina; only one of the Operations Centers is located in California (San
19 Francisco). (Vogt Decl., 2:2-10.)

20 In addition to the third party bank representatives, the location of third party
21 service providers used by Plaintiffs and the putative class members also favors a
22 transfer of this action to the Western District of New York. Indeed, the FAC alleges
23 that Handyman "hired an accountant" to review the company's financial records "to
24 assess the extent of [Paychex's] improper withdrawals" and that the accountant
25 spoke with a Paychex representative about it. (Exh. C, 18:15-19:4.) Likewise, the
26 FAC alleges that Road Service "contacted his 401(k) provider" who notified him
27 that "none of [the funds withdrawn by Paychex] were transferred towards his
28 retirement plan as indicated by Paychex." (Exh. C, 17:9-13.) Because Handyman

1 and Road Service are located in the Rochester, New York area, these service
2 providers likely are also located in that area, and the third party witnesses who
3 provided services to the putative class members also likely would be located in close
4 proximity to the putative class members who hired them - i.e., a majority located in
5 the eastern United States, with 24% located in New York and in the nearby states of
6 New Jersey and Pennsylvania.

7 As such, the Western District of New York also would be a much more
8 convenient forum for third party witnesses as compared to California.

9
10 **F. The Sources Of Proof Relevant To The Claims Alleged In The FAC**
11 **Are Located In The Western District Of New York**

12 Virtually all of Paychex's corporate and client records and documents are
13 maintained in separate databases stored on its computer servers physically located in
14 the Rochester, New York area. (Byrne Decl., 2:12-3:12; Deats Decl., 2:5-19; Vogt
15 Decl., 2:21-3:5; Wagner Decl., 2:1-8.)

16 These records include client service agreements and new account documents,
17 records pertaining to the electronic payroll services and Additional Services actually
18 provided to clients, client complaints about purported unauthorized transactions,
19 records reflecting ACH transactions processed on behalf of Paychex clients,
20 corporate policies, procedures, and protocols for processing client payroll services,
21 banking records reflecting the interest earned by Paychex on its cash positions,
22 client banking records, corporate banking records and advertising and marketing
23 materials. (*Id.*)

24 All of these records and documents would likely be key sources of proof on
25 issues raised in the FAC as to whether the transactions were authorized, whether
26 misstatements were made concerning fees, and the timing of the debit and credit
27 transactions at issue. (See Exh. A, 1:6-2:14; 6:13-14:6.) Access to Paychex's
28 records is generally not available to Paychex employees outside of its corporate

1 offices in the Rochester, New York area, except for certain employees who have
2 limited access to portions of Paychex's databases for specified purposes. (Byrne
3 Decl., 2:20-23.)

4 Due to the sheer volume and location of Paychex's records maintained in
5 separate restricted-access databases for over a half million of its clients, and of
6 related and additional hard copy evidence, it is axiomatic that principles of
7 convenience favor a transfer of this action to the Western District of New York.
8 *See, e.g., Italian Colors Restaurant v. American Express Company*, 2003 WL
9 22682482 (N.D. Cal. 2003) (granting motion to transfer venue to district where
10 defendant's principal place of business was located because "the cost of litigation
11 will be substantially lessened if the action is venued in the same district where most
12 of the documentary evidence is found.").

13 As such, the Western District of New York is also a more convenient forum
14 for access to the relevant sources of proof in this action.

15
16 **G. The Interests Of Justice Favor A Transfer Of This Action To The**
17 **Western District Of New York Because Plaintiffs And The Putative**
18 **Class Members Have Written Service Agreements With Paychex**
19 **Which Have New York Choice Of Law And New York Arbitration**
20 **Forum Selection Provisions**

21 All of Paychex's clients who utilize its electronic payroll services or
22 Additional Services such as retirement record keeping services, which require
23 Paychex to debit funds from the client's bank account (i.e., Plaintiffs and all of the
24 putative class members as alleged in the FAC), are required to sign written service
25 agreements with Paychex that contain a New York choice of law provision, and that
26 provide for binding arbitration in Rochester, New York. (*Byrne Decl.*, 3:22-4:6;
27 Exh. A, at ¶ 11; Exh. B, at ¶ 18; Exh. C, at ¶ 9.) Clients that utilize Paychex's
28 retirement record keeping services are also required to enter into a Master Custody

1 Agreement with JP Morgan in New York, and that Master Custody Agreement also
2 contains a New York choice of law provision. (Byrne Decl., Exh. D.) Paychex’s
3 services agreements incorporate the NACHA rules governing Paychex’s processing
4 of the ACH transactions at issue in this action, which likewise contain a New York
5 choice of law provision. (See Exhibit D; Byrne Decl., 3:27-4:7; Exh. A, at ¶ 11;
6 Exh. B, at ¶ 18; Exh. C, at ¶ 9.)

7 These factors weigh in favor of granting a transfer of this action to the
8 Western District of New York. Indeed, as courts have noted, the existence of a
9 contractual choice of law provision is a significant factor which favors granting a
10 motion to transfer venue brought under 28 U.S.C. § 1404(a). See *Italian Colors*
11 *Restaurant v. American Express Company*, 2003 WL 22682482 (N.D. Cal. 2003);
12 *Silver Valley Partners, LLC v. De Motte*, 2006 WL 2711764 (W.D. Wash. 2006).

13 In addition, the Western District of New York would likely be more familiar
14 with New York law, which must be applied in this action. (See Exhibit D; Byrne
15 Decl., Exh. A, ¶ 11; Exh. B, at ¶ 18; Exh. C, at ¶ 9.) This factor also favors granting
16 a transfer of this action to the Western District of New York. See, e.g., *Silver Valley*
17 *Partners, LLC v. De Motte, supra* (noting that district court where action would be
18 transferred to would be more familiar with the applicable law of the state in which it
19 is located). See also *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834
20 (9th Cir. 1986) (diversity case should be litigated “in a forum that is at home with the
21 law that must govern the action”).

22 Further, Plaintiffs and each of the individual putative class members have
23 agreed to arbitrate their purported claims in Rochester, New York in accordance
24 with the arbitration provision in Paychex’s service agreements with them. (Byrne
25 Decl., 3:27-4:7, Exh. A, at ¶11; Exh. B, at ¶ 18; Exh. C, at ¶ 9.) Under the Federal
26 Arbitration Act, the Western District of New York would have jurisdiction to hear
27 and decide petitions to compel arbitration of their claims. See 9 U.S.C. § 4 (“[a]
28 party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate

1 under a written agreement for arbitration may petition any United States district
2 court which, save for such agreement, would have jurisdiction under title 28, . . . for
3 an order directing that such arbitration proceed in the manner provided for in such
4 agreement”). Likewise, New York law would have to be applied to resolve any
5 challenges to enforcement of the arbitration agreements. *See* 9 U.S.C. § 3 (“[a]
6 written provision . . . to settle by arbitration a controversy . . . shall be valid,
7 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for
8 the revocation of any contract”). Thus, principles of judicial economy and
9 efficiency also would be better served if these arbitration issues are addressed and
10 resolved by the Western District of New York.

11
12 **IV. CONCLUSION**

13 For all of the foregoing reasons, Paychex respectfully requests that this
14 motion be granted and that this action be ordered transferred to the Western District
15 of New York.

16
17 DATED: February 27, 2009

McGUIREWOODS LLP

18
19 By: /s/ Matthew C. Kane
20 Matthew C. Kane
21 Bethany A. Pelliconi
22 Attorneys for Defendant PAYCHEX, INC.
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1 forth herein, which are known by me to be true and correct, and if called as a
2 witness, I could and would competently and truthfully testify thereto.

3
4 I declare under penalty of perjury under the laws of the United States of
5 America that the foregoing is true and correct.

6
7 Executed February 27, 2009, at Los Angeles, California.

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11 Bethany Pelliconi
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